

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

IN RE: NUVARING PRODUCTS  
LIABILITY LITIGATION

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Case No. 4:08-MD-01964 RWS

STATUS HEARING  
BEFORE THE HONORABLE RODNEY W. SIPPEL  
UNITED STATES DISTRICT JUDGE  
JULY 13, 2011

APPEARANCES

For Plaintiffs: Kristine Kraft, Esq.  
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(Appearances continued on page 2)

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APPEARANCES CONTINUED:

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1 (PROCEEDINGS STARTED AT 10:35 AM.)

2 THE COURT: Good morning. We're here this morning in  
3 the case styled *In re: NuvaRing Products Liability*  
4 *Litigation*, Cause No. 4:08-MD-1964. Would counsel make their  
5 appearances, please?

6 MR. DENTON: Good morning, Your Honor. Roger Denton,  
7 Kristine Kraft, and Megan Vanderbeek from my office for the  
8 plaintiffs.

9 MS. GEIST: Morning, Your Honor. Melissa Geist from  
10 Reed Smith for the defendant.

11 MR. BALL: Dan Ball, Bryan Cave, for defendants.

12 MR. YOO: Thomas Yoo also for defendants.

13 MR. STRAUSS: Steve Strauss also for the defendants.

14 THE COURT: Very good. We are here today on a  
15 prescheduled or scheduled status conference. I have the  
16 recommended agenda items from the parties, so we'll take them  
17 in order unless there are any announcements before we get  
18 started.

19 Ms. Geist? Ms. Kraft?

20 MS. KRAFT: No announcements.

21 MS. GEIST: No, Your Honor.

22 THE COURT: All right. Ms. Kraft, from your filing  
23 we have, No. 1, deadline for defendants to supplement  
24 discovery responses, including updated custodial files.

25 MR. DENTON: If I can?

1 THE COURT: Mr. Denton, all right.

2 MR. DENTON: Good morning, Your Honor.

3 THE COURT: I assumed Ms. Kraft was in charge. I  
4 apologize.

5 MR. DENTON: She has always been in charge, Your  
6 Honor, but I ran over here early and had a discussion with Ms.  
7 Geist and Mr. Ball to try to put some definition of this  
8 issue.

9 From our perspective, Your Honor, we believe, and the  
10 Court has previously indicated the obvious, that the federal  
11 rules require the defendant to make reasonable supplementation  
12 of discovery to bring it current and up to date. Defendants  
13 have not, obviously disagreed with that, but the issue is the  
14 timing and how we're going to get all this done, given the  
15 fact that we're working on expert reports right now and  
16 there's ongoing activity on this product.

17 We discussed some mechanism shortly before the  
18 hearing that may lead us to a resolution of this, although I  
19 have some concerns about the timing. For example, one of the  
20 big concerns I have, there is an ongoing safety study that the  
21 company is sponsoring and paying for, and they send periodic  
22 reports. We have not had a report on that, I believe, since  
23 December of 2010. We know they had a meeting in June, a  
24 committee meeting, and we believe they've recently  
25 corresponded some of this information to the FDA and probably

1 the European regulators. We haven't seen it yet. They're not  
2 disputing we're going to see it. My concern is when, in light  
3 of the fact that our expert reports are due in a couple of  
4 weeks and depositions will take place, and I'm trying to avoid  
5 a situation that additional information comes out after our  
6 experts are deposed and then they will need to supplement  
7 reports in supplemental depositions. I'm trying to avoid some  
8 of that and that's my concern, and that's just an example.  
9 And we're trying to see if we can work this out after the  
10 hearing, but I'm not sure yet if we're going to be able to do  
11 that. So that's basically the situation.

12 THE COURT: So you're cautiously optimistic but  
13 afraid?

14 MR. DENTON: I'm not sure I'm any of those, Your  
15 Honor, but --

16 THE COURT: Fearful. Maybe "afraid" is too strong.  
17 Fretting.

18 MR. DENTON: No. What I'm really trying to do is  
19 save all of us some time and money in trying to do this as  
20 efficiently as we can on both sides.

21 THE COURT: Right, I mean, because this isn't the  
22 kind of thing I can be involved in on a regular basis.

23 MR. DENTON: Correct.

24 THE COURT: Ms. Geist, do you have anything to add to  
25 that?

1 MS. GEIST: Thank you, Your Honor. Nothing much more  
2 than what Mr. Denton already said; although, I am certainly  
3 optimistic, Your Honor, we are going to work this out. We  
4 talked about timing. We talked about starting our  
5 supplementation of the custodial and other files consistent  
6 with the federal rules, beginning middle of August. We would  
7 complete that in the fall, and then we would do the process  
8 again in February for further updating. So the parties, I  
9 think, Your Honor, are going to be able to work this out.

10 THE COURT: I mean, Mr. Denton has this -- it's the  
11 fear of the unknown, not that he's afraid, but there's the  
12 fear of the unknown that is always a problem. It's usually  
13 the fear of the unknown is greater than the reality. You  
14 actually have a better idea about what we're talking about.

15 I mean, you understand that the pressures on the  
16 parties and the court to continue to move forward are  
17 substantial, and one of the things that can most likely create  
18 a detour is that these studies provide a substantial amount of  
19 new information or it's substantially substantive information  
20 between your client and the FDA that does cause us to have to  
21 stop, supplement experts' reports and do expert depositions  
22 again, which nobody wants to do.

23 MS. GEIST: Certainly, Your Honor. And with respect  
24 to the studying question, that is, the TASC study, we --  
25 keeping these points in mind that the Court just made, we have

1 continued to supplement with respect to the TASC study on an  
2 ongoing basis. I believe we are essentially current, Your  
3 Honor, as to the TASC study. Mr. Denton is correct. There  
4 was a meeting in June. There was a very recent, over the last  
5 week or two, submission to FDA for an interim report on the  
6 TASC study, and we would certainly be providing that to  
7 plaintiffs' counsel by mid August, if not before.

8 THE COURT: Because you uniquely know if this is the  
9 kind of information that's really going to have an effect or  
10 it's like, well, we kind of knew all that. We just got to  
11 keep going forward.

12 MS. GEIST: Part of the discussion that we had, Your  
13 Honor, too, is to assist plaintiffs' counsel so I'm not the  
14 only person who knows the types of documents we're talking  
15 about. We're happy to provide counsel with a list of the  
16 current custodians for whom we'll be supplementing and the  
17 different databases, the centralized databases that we'll be  
18 supplementing as well, just so we're all on the same page.

19 THE COURT: Mr. Denton, are you okay with that so  
20 far? Do you remain optimistic?

21 MR. DENTON: I remain optimistic so far, Your Honor.

22 THE COURT: All right.

23 MR. DENTON: But we're going to talk after the  
24 hearing.

25 MS. GEIST: Yes. Thank you, Your Honor.

1 THE COURT: All right. Both parties have on their  
2 agendas the stipulation regarding Rule 26 and that it should  
3 apply to experts in this case, the new rule.

4 Mr. Ball?

5 MR. BALL: This was a topic of discussion when we  
6 were here in May. After that, the parties reached a  
7 stipulation. I prepared a order for presentation to the Court  
8 and found out that I had a typographical error in it, so we  
9 will be submitting that. We can submit that to you  
10 electronically later today.

11 THE COURT: It's one of the few places people still  
12 have Wite-Out, you know, for jury instructions, you get  
13 halfway though an instruction and realize that something is  
14 wrong and you don't want to stop and leave while the jury's in  
15 the box. So I still have Wite-Out around if that will solve  
16 the problem.

17 MR. BALL: I think it would be easier if I just get  
18 it typed and submitted later today. There is no controversy  
19 about it. The parties have agreed that the 2010 amendments to  
20 Rule 26 as they pertain to experts will apply to all the cases  
21 in the MDL and, in fact, all of the pending NuvaRing  
22 litigation. So that's where we are in that issue.

23 THE COURT: All right.

24 MR. DENTON: Yes, Your Honor. The plaintiffs agree  
25 to that.



1 THE COURT: All right. Moving on to then Ms. Geist's  
2 submission. The first one was the Rule 26. Second was  
3 stipulation regarding depositions after the exchange of trial  
4 witness lists.

5 MR. BALL: Yeah. I had -- the same proposed order I  
6 just spoke of also includes that as a stipulated order that  
7 we'll present to the Court later today. Essentially what the  
8 parties have agreed to is what was discussed at the hearing in  
9 May and, that is, that 60 days before the trial date the  
10 parties will exchange reasonable and good faith witness lists.  
11 And if there's a witness on there that has not been deposed,  
12 then the parties agree that they will make that witness  
13 available within the next 30 days for a deposition so that  
14 we -- part of the purpose of this was so we're not taking  
15 unnecessary depositions, but we're also avoiding surprise. So  
16 the parties have worked that out, and it will be a part of the  
17 stipulated order that except for the typo, Mr. Denton has  
18 signed off on.

19 THE COURT: Okay. Defendants' motions to enforce  
20 compliance with court order regarding contention  
21 interrogatories and trial pool cases.

22 MR. YOO: Morning, Your Honor.

23 THE COURT: Mr. Yoo, how are you?

24 MR. YOO: I'm good, thank you.

25 We, on July 1, filed, I believe, seven motions

1 relating to the Court's order from back in December of 2010.

2 The plaintiffs' opposition was due, I believe, on July 8.

3 Instead of filing an opposition, they filed a motion seeking

4 additional time to respond to the motion and suggesting that

5 they would get that on file mid August, about two weeks after

6 their expert reports are due.

7 I'm not sure how the Court wants to deal with that

8 today, but from our perspective, this relates to basic

9 discovery that was propounded back in April of 2010 when

10 case-specific discovery got started. Your Honor will recall

11 that we had some issues with the vagueness of the pleadings.

12 I thought the parties were in agreement with the Court that

13 case-specific discovery would be the time to discover the

14 plaintiff-specific facts and bases for everyone's claims, so

15 we started by propounding discovery directed at those issues.

16 The initial response from the plaintiff was, we're

17 not going to respond, period, because you have plaintiff fact

18 sheets.

19 We had to file a motion to compel responses. The

20 Court, in December of last year, granted the motion and

21 ordered plaintiffs to provide responses I believe on a

22 staggered basis, with responses being due in January and

23 February.

24 We then got responses which essentially are not

25 factual, they don't contain any evidence, it's just conclusory

1 allegations, number one; and number two, they're virtually  
2 identical conclusory allegations across all seven plaintiffs'  
3 firms, across all of the trial pool plaintiffs. That simply  
4 cannot be.

5 From our perspective, it has basically made a mockery  
6 of the discovery that was propounded and is not compliant with  
7 the Court's order. We attempted meet and confers. Those were  
8 not successful, so we had to file a motion.

9 It's pretty clear to us that what's going on here is  
10 plaintiffs don't want to provide the factual evidence  
11 supporting each of the trial plaintiff's claims. They have  
12 told us in their discovery response and have pretty much said  
13 it again in their motion to extend their time to respond that  
14 they don't want to provide this information; rather, we should  
15 just wait and read their expert reports.

16 That's problematic for us on many levels. That's,  
17 number one, not compliant with the rules. Number two, it's  
18 not fair to us. As I think Your Honor can appreciate, expert  
19 discovery can be a little bit tricky. Experts are allowed  
20 leeway. They're obviously offering opinions. We need to know  
21 going in to expert discovery whether there's a factual basis  
22 or not. Plaintiffs have made a deliberate attempt here, I  
23 think, to not provide us those factual bases.

24 So we are in a situation where we were entitled to  
25 this information about a year ago, we have already gone

12  
1 through motion practice, we've now had to file a second set of  
2 motions, we don't have resolution, we have no factual  
3 information on a plaintiff-specific basis. I will also add  
4 that this week we had to file another wave of motions related  
5 to a subsequent set of similar type of discovery that was  
6 propounded, requests for admissions with attendant  
7 interrogatories and requests to produce. The request for  
8 admissions went something like: Admit that you have no  
9 evidence that your NuvaRing that you used --

10 THE COURT: I read them as contention requests for  
11 admissions.

12 MR. YOO: That's right. And we don't have any  
13 information there either. We got the same response, which is:  
14 Read our expert reports; it will be in there.

15 We think fundamentally that's defective, that's not  
16 compliant with discovery obligations, that's not compliant  
17 with the Court's order.

18 So at this point, I'm not sure what the best remedy  
19 is. We just want to know what the factual bases are on a  
20 plaintiff-specific basis. This relates only to the trial pool  
21 plaintiffs. We should have had that information a long time  
22 ago. We would like it immediately. We would like it before  
23 we get plaintiffs' expert reports.

24 MR. DENTON: Thank you, Your Honor. First of all, we  
25 have not yet had a chance to file a written brief, and we

1 believe our answers are appropriate. We find it odd that if  
2 the defendant got our answers in January and February, they  
3 just now bring it to the Court right after the 4th of July  
4 holiday, while we are in the process of working day in and day  
5 out to get these expert reports done in July, and it really is  
6 a burden. But the motion isn't ripe yet. We have a right to,  
7 and we'd request the right, to respond.

8 The same goes for the motion on the contention  
9 requests for admission. That motion, I think, was just  
10 filed -- it was filed on the 12th.

11 THE COURT: Yesterday.

12 MR. DENTON: Yesterday. So we clearly haven't had an  
13 opportunity to respond to that. But we have a fundamental  
14 disagreement, without waiving other arguments that we will  
15 brief, that, A, these are not general -- that there's somehow  
16 case-specific issues. I think there are, but many of these  
17 issues, Your Honor, whether the products are defective,  
18 whether the products are designed defective, whether or not  
19 the label is adequate, whether or not there was  
20 misrepresentations to the regulatory bodies, and a list of  
21 issues are generic and general to all plaintiffs.

22 To say that a particular plaintiff or particular  
23 doctor is unique or different than all doctors on some of  
24 these points, is inappropriate and probably nonexistent.

25 Clearly, we are required and will set forth very

1 detailed bases for any opinions of any experts, and that will,  
2 in large part, give the defendants what they need.

3 The other thing, Your Honor, is the so-called  
4 contention interrogatories that say something like this:  
5 Please admit you have no evidence of basically our entire  
6 case.

7 I guess we could, in response, file a request to  
8 admit and admit you have no evidence that you properly warned  
9 any particular doctor in the United States.

10 It seems to be that that's not the type of fact that  
11 the rule contemplates. If there is a specific fact or a  
12 specific document, that's one thing, but to basically say,  
13 admit you have no work product -- I mean, it is our work  
14 product -- or to admit you have no evidence, we don't think is  
15 proper under the rules, and we'd like to offer you some case  
16 law in that regard in response to this. In large part this is  
17 going to be a moot issue in my mind. Our reports are due  
18 August 1?

19 MS. KRAFT: Right.

20 MR. DENTON: August 1. And we intend and we'll make  
21 that deadline.

22 The other thing, Your Honor, is discovery is ongoing.  
23 There's no way that we're going to be able to, for example, on  
24 the safety studies say we know all the evidence at this point.  
25 The evidence is ongoing, and the defendants have stood up

1 today and told you, as of this time, there's evidence that we  
2 have not yet had. I'm not faulting them for not giving us the  
3 evidence yet, but then to turn around and say, tell us every  
4 piece of evidence you have that supports an issue, we think is  
5 inappropriate.

6 So our view is, these are not ripe for judicial  
7 resolution, we will respond if needed, and intend to, and then  
8 the Court can tell us in its order what we should be doing,  
9 but we believe there is no surprise here. They know what the  
10 issues are. They've attended the depositions. They certainly  
11 will know our positions when they get our expert reports in  
12 15, 16 days, something like that. I may have the math wrong.  
13 Eighteen days maybe. And that's generally where we're at.  
14 Thank you, Your Honor.

15 MR. YOO: Your Honor, from what I just heard from Mr.  
16 Denton, I mean, that's an argument against contention  
17 discovery in general. It's an argument against fact discovery  
18 as opposed to expert discovery. I don't think there's any  
19 basis for that. We're entitled to this information. We asked  
20 it at the beginning of case-specific discovery, and they have  
21 apparently done a successful job of not giving it to us until  
22 now. And I just heard Mr. Denton tell the Court again that  
23 they don't want to do this; that it's moot because it will be  
24 in the expert reports.

25 Obviously, the experts, before they can give an

opinion in a specific case, has to consider the facts and the bases for the claims. So they're presumably providing the experts with something. They should be giving that to us. They should have given it to us already in fact discovery.

The argument that the cases are all pretty much the same, I just don't think that gets out of the gates. We're talking about stroke cases, pulmonary embolism cases, DVTs, plaintiffs in their twenties, plaintiffs in their forties, plaintiffs who used the product for a month, plaintiffs who used it for three years. How could it be identical across all cases?

Let me give you one example. Our discovery asked: Set forth all facts and bases that support your contention that your alleged injury was caused by your use of NuvaRing.

Answer. This is across all plaintiffs and all firms. Plaintiffs medical records -- excuse me. Plaintiff's medical records, medical literature on VTE. Note, it is also expected that experts whom plaintiffs hired hereafter will give support on causation. What are we supposed to do with that? That isn't fact discovery. And that's in no way complying with this Court's December 2010 order telling plaintiffs that they have to provide the case-specific facts.

Plaintiffs' motion for an extension of time to respond, Your Honor, cites an undisclosed scheduling conflict and asks for another month. They've already had two weeks



1 since the time we filed our motion to get a response on file.  
2 They've not done that. With an undisclosed scheduling  
3 conflict that apparently prevents every lawyer at seven  
4 different law firms, representing twenty-some plaintiffs, from  
5 responding to any of this until two, three weeks after their  
6 expert reports are due, I think just proves the point. I  
7 think we're caught in some gamesmanship here and we're --

8 THE COURT: Mr. Denton, how about it? When are we  
9 going to -- I mean, what we're talking about now is your  
10 response to the motion before I can even get to it. I mean,  
11 you know my predisposition. I'm not going to treat this case  
12 any different than I would any other. You have the right to  
13 respond, but you know, it's not going to take you six more  
14 weeks to write a response to this.

15 MR. DENTON: Well, the reason for that, Your Honor,  
16 is, is that all of those firms are in seven-day-a-week mode  
17 trying to get these expert reports done. That's what this is,  
18 and we see the timing of this frankly from our perspective in  
19 teeing this up in July, when it was apparently, from their  
20 view, ripe in January or February, is nothing but a  
21 distraction from us getting our work at hand.

22 We would like to, if we have to deal with this, get  
23 the reports done and then deal with it because it will take  
24 time to respond to every single one of these, and I can tell  
25 you that those firms are working seven days week. We had a

meeting Sunday, all day Sunday on experts, and different things vetting certain things, and so it is a process we are very much engaged in, and you know, I'd tell the Court that over the last couple of years we've had many, many times where the defendant has asked for months, if not longer, to respond to discovery matters. And so I don't think this is unreasonable under the circumstances.

THE COURT: I'm not even talking about responding to the discovery. The question on the table now is your response to their motion.

MR. DENTON: Okay.

THE COURT: I mean, this is putting a little sand in the cogs here, because if you wish to be heard on their motion, you have to be heard on their motion. Only then can I tell you what the scope of your response needs to be.

MR. DENTON: Correct.

THE COURT: I mean, you already have a theory about why you shouldn't have to answer these interrogatories or why your answers are sufficient or what it is you're going to do to fix it.

MR. DENTON: Correct.

THE COURT: That's a little different than providing all the information. I assume you're kind of conceding that there needs to be more information provided to the defendant; otherwise, this wouldn't be a big burden. You just say, I win

1 because, and I don't have to answer this.

2 MR. DENTON: Well, I think there is a burden on all  
3 these firms. And let me just tell you, Your Honor, I don't  
4 think this is limited to the seven trial cases. They've filed  
5 this motion on all 24 cases. So we have to -- is that  
6 correct?

7 MS. KRAFT: Yeah. Definitely on the first motion  
8 pertaining to reports on the Court's prior order, No. 3 of  
9 their agenda.

10 THE COURT: At a minimum, obviously, we have to focus  
11 on the eight cases that have been teed up for trial.

12 MR. DENTON: Right, right. And that would be a  
13 reduction of our response. You know, if the Court is  
14 asking --

15 THE COURT: I'm at a loss as to why it would be  
16 easier to respond to eight instead of twenty-three if your  
17 view is, is that is a universal problem.

18 MR. DENTON: Well, I think it is, but it also  
19 involves other law firms, Your Honor, that I don't know what  
20 their schedule is. And I can't respond for another law firm  
21 and their client as to what they want to do. I can respond to  
22 my clients, obviously, and I will do that. You know, if the  
23 Court would give us until next Friday to file a responsive  
24 brief, we'll get it done somehow.

25 THE COURT: Well, let's do it by next Friday.

1 MR. DENTON: All right.

2 THE COURT: Then, obviously, I'll expect to hear from  
3 Mr. Yoo as to whether you intend to file a reply or you deem  
4 it submitted. Let me know. I assume you'll want to reply.  
5 You've never been at a loss for words before.

6 MR. YOO: Why don't we get our reply on file by the  
7 following Thursday.

8 THE COURT: Okay. That will be helpful.

9 Okay. Does this really overlap us into the fourth,  
10 which is the motions -- I take it, Ms. Geist -- I'll wait.

11 MR. YOO: Your Honor, No. 4 relates to the --

12 THE COURT: All the material that was filed  
13 yesterday?

14 MR. YOO: Yeah.

15 THE COURT: So we just have to take some time here.

16 MR. YOO: Yeah. I would assume that plaintiffs will  
17 respond timely to those.

18 THE COURT: And you'll reply. And we may need to get  
19 together sooner rather than later at some point; although,  
20 with your expert schedule I'm not here to mess that up, but we  
21 will find a time to get together to bring some of this to  
22 closure.

23 MR. YOO: Thank you, Your Honor.

24 THE COURT: Motion for protective order regarding  
25 certain requests for admissions.

MR. BALL: Yeah, Your Honor. We have had some discussions, Roger and I have had, about this issue. Here's what the background is briefly. You may recall in May there was a discussion about foundation for certain company documents and there was some discussion about how we're going to go about doing that. We are not going to just give a blanket agreement that every single document is a business record admissible, et cetera. So the plaintiffs filed over a thousand requests for admissions. We are endeavoring to respond to over a thousand of them. We have approximately a hundred and something that are set forth in the motion that we are asking the plaintiff to withdraw or the court to strike as a part of our protective order and here's why.

The other thousand that are not the subject of the motion essentially are one or two or three pieces of paper or maybe ten pages, or something like that, and we're responding to those.

The ones that are subject to this motion, they have hundreds, thousands, tens of thousands, hundreds of thousands, or --

THE COURT: You want them to be more particularized in their request?

MR. BALL: Well, particularly when they get up to a million.

THE COURT: Right.

1 MR. BALL: And I've had discussions with them about  
2 this with Roger. He has not said he won't withdraw them and  
3 start over with these. He hasn't said he will. So we filed  
4 the motion for protective order. We have an extension, an  
5 agreed extension, to the end of this month to respond to the  
6 other thousand, but we put this protective order on place with  
7 the ones that are too burdensome and voluminous, and all we  
8 ask is that they go through and actually identify the ones  
9 that they really need responses to, and we'll respond as we  
10 are in the others.

11 MR. DENTON: Your Honor, I have been working with  
12 them and I, frankly, gave them an extension of time  
13 voluntarily, so I just want that out there. But there are a  
14 couple of things that are problematic here. It would seem to  
15 me that -- some of these are large, but they're categorized in  
16 a custodian file; so Dr. So-and-So, this is her custodial  
17 file, and these are the documents from that file.

18 A couple of things ought to be self-evident: One,  
19 that any copy they produce to us should be authentic; and two,  
20 they should be willing to admit that they came from that  
21 custodial's file. That's a blanket, generic, across the board  
22 and some of these files are very large, but we shouldn't need  
23 to, in those, to go document by document. And that's  
24 problematic, and we sent an amended request to clarify some of  
25 that.

Other things like the NDA, the submission to the FDA, very, very large file. This should not be one that we have a problem with even though there's many pages. There is what you submitted, this is authentic, and was done.

In fact, this is typically done in litigation when the documents are produced that there's a verification that the documents are authentic copies and came from a certain file. They ought to be willing to do that. To this day, they have not agreed to do that.

Beyond that, if we have to go document by document as to whether or not an e-mail sent from one high-level employee to another high-level employee was in fact done in the ordinary course of business at the time and date on that e-mail to lay a business record foundation, I think that's what they're suggesting that we do, and it just seems onerous.

And I'm willing to try to work with them to get through this, but I don't want to be stuck with an obvious document that should otherwise be admissible that we don't have a proper foundation and have an objection. And frankly, I'm trying to avert this before we are, you know, a few months before trial, because if there are legitimate objections they raise, I may need to take, and would take, a foundation-type deposition.

And I want this sorted out now, not months from now. And so we need to try to work through that, but I don't know

1 if I go through and, for example, take the extreme and have a  
2 separate request for admission for all one point million  
3 documents, does that solve any problem?

4 If that's what they want, we can go through that  
5 exercise, but it seems to me the substantive issues are still  
6 there. So we need to resolve this and I think that what we  
7 have done is appropriate. We still haven't briefed this  
8 motion and we still haven't seen their responses to the ones  
9 that they are going to respond to, and perhaps that would give  
10 me some sense of where we're at because there's a large  
11 number, I think, documents that were marked as exhibits in  
12 deposition that I believe they were going to respond to, as I  
13 understand, so we can see where we're at.

14 But I'm trying to not have a hiccup or a problem at  
15 the time of trial. I'm trying to do this proactively. And  
16 you know, we're entitled to know if there is going to be a  
17 business record objection to certain documents, and I don't  
18 know how else to do it.

19 MR. BALL: I can help.

20 THE COURT: Mr. Ball knows how to do it.

21 MR. BALL: First of all, it's just sit down and  
22 decide which documents you're going to be using at trial.

23 THE COURT: You know --

24 MR. BALL: I mean, a million documents -- a million  
25 pages in one request is ridiculous.



1 THE COURT: No. Look, a million pages is too much.  
2 We all agree.

3 MR. BALL: No --

4 THE COURT: I would much rather -- look, you're not  
5 going to have a discussion among yourselves while I'm here.  
6 You can do that when I'm gone. It's always good to talk, but  
7 there's no reason to fuss, all right?

8 We agree. A million pages is too much. The example  
9 of the NDA is a good one. You either admit that's what you  
10 submitted to the FDA or it's not. Now, that is a tedious  
11 task, but you probably did it at the beginning when you  
12 produced it and now you just need to verify that what he's  
13 identified -- you identified in those Bates stamps are still  
14 the Bates stamps everybody is using and in fact that's what it  
15 is. And I suspect you'd much rather have Ms. Geist, or I  
16 assume you've locked Ms. Weissman in some basement somewhere  
17 in California, making that decision than have him take a  
18 deposition of somebody at the company and go through it with  
19 them. You don't want to do that.

20 MR. BALL: No.

21 THE COURT: So you have a meeting of interests here.

22 MR. BALL: That's not the issue. The issue is, with  
23 all due respect to Roger --

24 THE COURT: Oh, oh, oh, you just tripped over the  
25 trap door, okay? Any sentence that starts with "with all due

1     respect" is a very, very bad one.

2             MR. BALL:   Then I withdraw that.   Nothing was wrong  
3     about what he was saying.

4             THE COURT:   Nothing good comes after "with all due  
5     respect."   You might as well call him a name and move on.

6             MR. BALL:   He didn't quite appropriately say what his  
7     requests say.   His requests don't say, please admit this is  
8     the custodial file of Joe Smith.   They ask us every single  
9     document's authentic, every single document was prepared in  
10    the ordinary course of business, every single document was  
11    prepared by a person with knowledge of the events at the time  
12    and the opinions stated in there are accurate.   That's -- so  
13    that's the problem.

14            THE COURT:   Mr. Denton, why don't we approach.   We  
15    can solve this right now.   I'll save you writing a response.  
16    You understand the point, too.   His point is well taken.

17            MR. DENTON:   Well, I understand that, but he's not --  
18    apparently hasn't read the amended request that we sent him a  
19    week ago.

20            MR. BALL:   I have no knowledge of any amended  
21    request.   I have knowledge of requests that you sent in the  
22    state court cases that are better but not there, but I have no  
23    knowledge of --

24            THE COURT:   Okay.   So you need to send out an amended  
25    request if you haven't otherwise.   So if you haven't already,

1 you're going to send out an amended request. With all due  
2 respect, Mr. Ball.

3 MR. DENTON: Absolutely. But they've been identical  
4 in every case. And for them to suggest --

5 MR. BALL: No, no, no, Roger. I'm sorry. The MDL is  
6 different than --

7 THE COURT: I think that you all can work this out  
8 because, you know, a million is too many. Mr. Ball feels  
9 strongly that a million is too many. Mr. Ball also knows he  
10 doesn't want you taking depositions of random people to  
11 authenticate these documents if you haven't already done so,  
12 and you just need to identify by custodial files or other  
13 discrete categories these records, and then we'll get it done.

14 MR. DENTON: Okay.

15 THE COURT: And if you need to do amended requests,  
16 and if you haven't already done so -- because apparently Judge  
17 Martinotti feels pretty oppressed by your document production  
18 issues.

19 MR. DENTON: I don't know. I have not appeared in  
20 front of Judge Martinotti, so I can't answer that, Your Honor.

21 THE COURT: Maybe you haven't had the pleasure.

22 MR. DENTON: Oh, I've been in front of him one time  
23 early on, but not recently.

24 THE COURT: Off the record.

25 **(DISCUSSION OFF THE RECORD.)**

1 THE COURT: We're back on the record. Use of  
2 treating physicians as experts and consultants. By the way,  
3 what did you do to Ms. Weissman?

4 MS. GEIST: She has moved on to other matters, Your  
5 Honor.

6 THE COURT: Okay.

7 MS. GEIST: She's not in the basement, Your Honor.

8 THE COURT: I thought you locked her in the boiler  
9 room.

10 MR. YOO: Your Honor, Issue No. 6 relates to our  
11 consulting with a physician in the medical community as an  
12 expert. It turns out he treated one of the plaintiffs in the  
13 litigation. We have not discussed with the doctor any issues  
14 relating to that plaintiff. We have not invaded the  
15 physician-patient privilege. But as a professional courtesy,  
16 and to avoid any misunderstanding down the road, we alerted  
17 Mr. Denton to the situation but, apparently, we're not seeing  
18 eye to eye. Plaintiffs object to our consulting with anyone  
19 who has treated any plaintiff on the litigation.

20 We think that's unfair. We can't be hamstrung from  
21 meeting with perspective experts. We don't intend to discuss  
22 ex parte any issues relating to a patient of theirs who  
23 happens to be a plaintiff in the litigation. So we don't  
24 think we're doing anything wrong, but since the issue has come  
25 up, we wanted to raise it for the Court's attention.

1 THE COURT: All right. Mr. Denton?

2 MR. DENTON: Your Honor, I was somewhat surprised  
3 this was on the agenda because there's no pending motion, but  
4 Mr. Ball did send me an e-mail to this effect, I want to say,  
5 seven to ten days ago. I told him that we strongly object to  
6 it, there's case law on it, and it needs to be handled. But  
7 there are a number of cases that would preclude this. In  
8 short, Your Honor --

9 THE COURT: This is easy then. I'm going to give you  
10 each ten days to file simultaneous briefs with me about what I  
11 should do. We agree that you've -- you know, we're seeking to  
12 retain as an expert a physician who treated one of the  
13 plaintiffs, right? But nobody has tripped over the Chinese  
14 wall of any knowledge about the individual plaintiff, so what  
15 is the consequence or result? And I don't think that's --  
16 there's no reason to do back and forth. I assume you want to  
17 know sooner rather than later.

18 MR. YOO: That's fine, Your Honor.

19 THE COURT: Why don't we do simultaneous briefs in  
20 ten days. If someone feels, oh, my gosh, I really got to  
21 respond to that, which I suspect will happen, file a quick  
22 motion and within the week, you know, ten days to brief it,  
23 seven days to respond. I'll take it as submitted within three  
24 weeks. How's that?

25 MR. YOO: Thank you, Your Honor.

1 THE COURT: That brings us to replacing of dismissed  
2 MDL trial pool cases. We haven't lost any of our final eight,  
3 have we?

4 MS. GEIST: No, Your Honor. We have not. The final  
5 eight remain, at least at this point, in the litigation. Our  
6 concern is, Your Honor, there is now an imbalance in the  
7 inventory of bellwether cases. As the Court is aware, we  
8 started off with 25 cases. We spent a long time discussing  
9 this with Your Honor that this would be the appropriate number  
10 to ensure that as we move forward in the litigation and cases  
11 necessarily drop out due to motions, or for whatever other  
12 reason, we have enough cases worked up so that we don't need  
13 to go back to the beginning.

14 We have lost three cases on the defense side -- the  
15 Easter Brown, Jennifer Anderson, and Sherrika James case. So  
16 at this point, Your Honor, when you look back at the pool of  
17 cases in the bellwether inventory, there's an imbalance.  
18 There are three less defense picks originally. So what we  
19 would like to do, Your Honor --

20 THE COURT: The thing that I would be most angst  
21 about is whether they were all stroke cases, DVTs, or what  
22 were the nature of the injury alleged, because one of my  
23 greater concerns is if the cases reflect a cross section of  
24 the results. You know, we'd all end up with all stroke cases  
25 in the end, and that makes it impossible to have any jury

1 experience with a DVT or a heart attack. Do you follow me?

2 MS. GEIST: I do, Your Honor. I do. I'd have to  
3 actually look up, Your Honor, which injuries are alleged in  
4 those cases.

5 THE COURT: Anyway, what was your proposal? I cut  
6 you off.

7 MS. GEIST: The proposal is simply this, Your Honor.  
8 We have had this same issue come up before Judge Martinotti in  
9 New Jersey, and when the cases dropped out, we've simply, as a  
10 matter of course, been able to substitute in a new defense  
11 pick. So our proposal, Your Honor, would be simply that, that  
12 we go ahead and substitute in three new defense picks in the  
13 bellwether pool. We would work up those cases in terms of the  
14 discovery. Those would be outside of the eight trial pool  
15 cases that are being worked up now for expert discovery.

16 THE COURT: Any response?

17 MR. DENTON: Again, Your Honor, I had no knowledge  
18 this was going to be on the agenda until I saw it late  
19 yesterday, so I would like --

20 THE COURT: Do you think this is something you can  
21 work out?

22 MR. DENTON: Oh, certainly, we'll talk to them.

23 THE COURT: It certainly sounds on its face, without  
24 thinking about -- oh, I'm sure you're sitting there thinking  
25 of all the nefarious things Ms. Geist must be up to, but

1 there's a way -- I mean, it would be whoever lost a case would  
2 substitute a case.

3 MR. DENTON: Except my -- I have no problem with  
4 that, but at this point let's focus on the seven that we have  
5 worked up for trial instead of adding three more in for  
6 discovery for whenever, many years from now. It just seems  
7 like this isn't the time to take that up. There may be an  
8 appropriate time, and there may be an appropriate proposal  
9 that makes sense, but none of those three cases are with my  
10 firm, as I don't recognize those names, I don't know the  
11 nature of those cases, and we'd like to be able to discuss it  
12 with them. But the timing, it seems inefficient to be doing  
13 case-specific discovery on three new cases.

14 THE COURT: It also seems inefficient to stop, to be  
15 honest.

16 MR. DENTON: For what purpose, Judge? I mean --

17 THE COURT: To continue the progress.

18 MR. DENTON: We've got seven cases in the queue that  
19 have to get tried before we get to whatever this next group  
20 is. That will be years from now, I believe, if we try them  
21 all. Certainly more than a year from now. So why the  
22 expense? What's the purpose of that at this point in time?

23 THE COURT: I'll give you the same thing, each ten  
24 days to tell me what you think we should do about cases as  
25 they fall out, if you will, of the bellwether category. And



1 either you're going to agree or I'll pick one or the other.

2 We're going to take a short recess. We've gone  
3 through the agenda, but there was the one pending motion on  
4 redaction. I don't know if you intended to take that up today  
5 or if you've resolved that.

6 MS. GEIST: Your Honor, I believe that's pending.  
7 That is not our motion. That is plaintiffs' motion that was  
8 on the agenda.

9 MR. DENTON: I'll be happy to take it up today, Your  
10 Honor.

11 THE COURT: We'll reconvene in about five minutes.

12 **(COURT RECESSED FROM 11:15 AM UNTIL 11:22 AM.)**

13 THE COURT: So Ms. Kraft and Mr. Strauss, what were  
14 you working on?

15 MR. STRAUSS: We were working on the --

16 THE COURT: You got to go to the podium or it didn't  
17 happen. You know the rule of the room.

18 MR. STRAUSS: Yes, sir, Your Honor. Ms. Kraft and I  
19 were working on potential resolutions to the request for  
20 admissions with respect to authenticity of documents in the  
21 large swath of documents versus custodial files and the like,  
22 and we're going to continue working on that, but we think we  
23 have some progress.

24 THE COURT: That's certainly workable outable.

25 MR. STRAUSS: Yep.

1 THE COURT: All right. Want to take up the redaction  
2 issue? I mean, it's fully briefed.

3 MR. DENTON: Correct, Your Honor.

4 MS. GEIST: Your Honor --

5 THE COURT: But Ms. Geist has a thought.

6 MS. GEIST: That would be my motion, Your Honor,  
7 certainly because it falls in the purview of documents. I  
8 don't have the briefs with me, Your Honor. I was certainly  
9 not prepared because it wasn't an agenda item. So I apologize  
10 to the Court, but I was not prepared.

11 THE COURT: All right. Since it wasn't on the  
12 agenda, I'm hard put to force the issue.

13 MR. DENTON: I'm not asking.

14 THE COURT: As much as I hate to write, I'd much  
15 rather talk.

16 MR. DENTON: I would rather talk as well, but if  
17 you'd like to write an order on that, that would be fine.  
18 It's fully submitted.

19 THE COURT: Maybe we'll get together sooner rather  
20 than later to work through, because sometimes the nuances can  
21 come out in a conversation that aren't as obvious in the  
22 written page, too, that --

23 MR. DENTON: Okay.

24 THE COURT: There were a couple other things that I  
25 saw in the open motions list that I wanted to clean up if we

1 could.

2 Why don't you tell me, Ms. Geist, where are you with  
3 Judge Martinotti, because the motion on redactions in New  
4 Jersey is different than the motion on the redactions here.

5 MS. GEIST: You're absolutely correct, Your Honor.  
6 It is. Here in the MDL, Your Honor, my recollection is that  
7 the motion is seeking sort of --

8 THE COURT: Prospective.

9 MS. GEIST: Prospective relief only, correct. And in  
10 New Jersey the relief is different. The plaintiffs' counsel  
11 there is asking for sort of a redo of the entire production to  
12 date. That is my general understanding of the difference.

13 THE COURT: That alone would be an MDL for heart  
14 attacks, asking you to go back and redo the document  
15 production in this case.

16 MS. GEIST: Yeah. I think we've already revisited  
17 that issue, Your Honor, concluded that that would not be a  
18 good idea. It would certainly hold things up.

19 THE COURT: Is that fully briefed in front of Judge  
20 Martinotti?

21 MS. GEIST: It is fully briefed, Your Honor. Judge  
22 Martinotti held oral argument on that motion and two other  
23 pending discovery motions that had been filed by plaintiffs'  
24 counsel by telephone. He followed up and asked for a copy of  
25 the transcript of that oral argument on those three motions,

1 and I'm hopeful that he will provide us with his decision and  
2 insight either before or during the case management conference  
3 that we have in New Jersey next Wednesday, July 20.

4 THE COURT: Why don't you all let me know what Judge  
5 Martinotti does next Wednesday because that may make this  
6 moot. I mean, if he rules against you, obviously I'm the  
7 least of your concerns at that point. Fair?

8 MS. GEIST: We're happy to do that, Your Honor.  
9 Thank you.

10 THE COURT: We'll see where we are.

11 There's the one case that there was -- we finally got  
12 to a protocol for what to do when plaintiff fact sheets aren't  
13 filed, and it's very clear this is what's going to happen,  
14 don't wonder, and then we dismissed Isakson, and there was a  
15 motion for extension of time to provide that fact sheet and no  
16 one responded on behalf of the defendant. So should I just  
17 grant that? Are you familiar with that case?

18 MS. GEIST: Your Honor, I am familiar with the case.  
19 My understanding, I believe it is a case being handled by Mr.  
20 Rheingold who's not here today, but my recollection is that  
21 things had simply crossed and he had in fact provided or was  
22 in the process of providing us with a fact sheet. So I agreed  
23 that we would not oppose his motion.

24 THE COURT: All right.

25 MR. RHEINGOLD: Your Honor, it's Paul Rheingold. I

1 evidently had the time wrong because I thought the conference  
2 was just going to start, but I did hear Ms. Geist, and that's  
3 correct.

4 THE COURT: All right. Very good.

5 And do I have any -- we did a briefing schedule on  
6 the motion -- are there any protective orders that we haven't  
7 said here's when you're going to file your responses, and so  
8 it will be at issue?

9 MR. DENTON: I think you directed us on all of them.

10 THE COURT: Did I miss anything?

11 MR. BALL: One involving request for admissions by  
12 rule you haven't --

13 THE COURT: Yeah. That was just filed yesterday.  
14 There was no reason for me to mix that up.

15 MR. DENTON: Correct, correct.

16 THE COURT: Okay. Oh, you're going to work out the  
17 issue as to the authentication of the documents. I didn't  
18 give you a timetable for that, I don't think. That's the one  
19 that I don't have a backstop for. Do you follow me?

20 MR. BALL: I believe that the plaintiffs are okay  
21 with this; that while we continue to work on that issue, we  
22 are not going to respond to those paragraphs that are the  
23 subject of the motion for protective order, true?

24 MR. DENTON: That's true.

25 MR. BALL: And then so I guess that motion for

1 protective order can be granted until we come up with a  
2 proposal to deal with --

3 THE COURT: Well, I'm not going to do anything with  
4 the motion.

5 MR. DENTON: I haven't responded to it yet.

6 THE COURT: The only thing I'll assure you of,  
7 though, is next time we get together if it's not resolved,  
8 we're going to take it up and resolve it.

9 MR. BALL: There you go.

10 MR. DENTON: That's very reasonable.

11 MR. BALL: That's fine. And in the meantime, we can  
12 respond to the request for admissions. Okay.

13 THE COURT: So not to be difficult in the expert  
14 discovery phase, when is a good time for us to get back  
15 together? It strikes me we do need to get together in the  
16 next four to six weeks.

17 MR. BALL: We were going to suggest the week of  
18 August 15, by phone.

19 THE COURT: Monday or Tuesday I'll be at the Eighth  
20 Circuit conference in South Dakota. We go to such glorious  
21 places.

22 MR. BALL: Then later, if we do it later in the week,  
23 we can do it, but --

24 THE COURT: I'm available Thursday and Friday that  
25 week.

1 MR. BALL: How about Thursday afternoon of that week,  
2 which would be the --

3 THE COURT: 1:30 central?

4 MR. BALL: That would be good for us.

5 THE COURT: 1:30 central.

6 MR. BALL: What is that?

7 THE COURT: The 18th.

8 MR. BALL: Is that okay?

9 MR. DENTON: I'll make it work, Your Honor. We'll  
10 make it work somehow.

11 THE COURT: Our next status conference will be 1:30  
12 central on the 18th, and we'll take it from there. Anything  
13 else while we are together? Telephone conference, correct?  
14 Okay. Anything further?

15 MR. DENTON: I don't think so, Your Honor. I wasn't  
16 clear if that on the 18th was by phone or in person. I would  
17 prefer by phone.

18 THE COURT: They recommended by phone. I heard  
19 telephone.

20 MR. DENTON: I did, too. I just wanted to clarify.

21 MS. GEIST: Your Honor, would anybody object to 2:30  
22 central? Would anybody object?

23 MR. DENTON: Not by phone.

24 THE COURT: 2:30 central.

25 MS. GEIST: Thank you, Your Honor.

1 THE COURT: It just interrupts Mr. Yoo's lunch hour,  
2 that's all.

3 MR. YOO: We have nothing else for today, Your Honor.  
4 Thank you very much.

5 THE COURT: I still need to have a hearing held in  
6 Muskogee before this is over, you know that.

7 MR. YOO: Sure.

8 THE COURT: Thank you all very much.

9 (PROCEEDINGS CONCLUDED AT 11:35 AM.)

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CERTIFICATE

I, Shannon L. White, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 41 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 21st day of July, 2011.

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/s/Shannon L. White  
Shannon L. White, RMR, CRR, CCR, CSR  
Official Court Reporter